

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000864-MR

HERBERT BROOKS

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 03-CR-00195

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Herbert Brooks bring this appeal from a March 29, 2007, order of the Campbell Circuit Court denying a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing.¹ We affirm.

¹ This was the second Kentucky Rules of Criminal Procedure 11.42 motion filed by Herbert Brooks after his conviction for second-degree rape was entered by judgment on September 10, 2003.

Brooks was indicted by a Campbell County grand jury of first-degree rape on May 15, 2003. Pursuant to a plea agreement, Brooks pleaded guilty to second-degree rape on July 23, 2003. Prior to sentencing, Brooks, *pro se*, sought to withdraw his guilty plea and requested new counsel be appointed to represent him. At a hearing on Brooks' motion, Brooks retracted his motion to withdraw the guilty plea. The circuit court granted Brooks' request for new counsel and appointed substitute counsel to represent Brooks at sentencing.² Brooks was subsequently sentenced to ten years on the amended charge of second-degree rape on September 10, 2003.

On May 27, 2004, Brooks filed a *pro se* motion to vacate his judgment pursuant to RCr 11.42. Brooks specifically asserted:

When due to defense counsel's lack of diligence, misleading and inadequate investigation, the movant was coerced into making a plea of guilty as his counsel misadvised Movant as to the amount of time Movant could have received

By order entered June 9, 2004, the circuit court denied Brooks' RCr 11.42 motion without an evidentiary hearing. Brooks did not appeal from that order.

Brooks subsequently retained counsel, and on September 11, 2006, a second RCr 11.42 motion was filed. Therein, Brooks claimed that his counsel was ineffective for failing to investigate the facts of the case and for failing to request that Brooks have "a separate trial" from his co-defendant. On March 29, 2007, the

² Judge Wehr appointed attorney Patrick Walsh, who was also counsel for Brooks codefendant in this case, to stand in for Brooks at sentencing. Judge Wehr stated on the record that he did not perceive a conflict in Walsh's limited role for sentencing. Brooks did not object.

circuit court denied Brooks' second RCr 11.42 motion without an evidentiary hearing. This appeal follows.

RCr 11.42(3) provides:

The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

It is well-established that a successive RCr 11.42 motion that raises allegations of error which could have been raised in the previous RCr 11.42 motion should be summarily denied as successive. *Hampton v. Com.*, 454 S.W.2d 672 (Ky. 1970); *Case v. Com.*, 467 S.W.2d 367 (Ky. 1971); *Butler v. Com.*, 473 S.W.2d 108 (Ky. 1971). In this case, Brooks filed a *pro se* RCr 11.42 motion on May 27, 2004, and the circuit court denied that motion on June 9, 2004. Then, on September 11, 2006, Brooks, by counsel, filed a second RCr 11.42 motion, which was denied by the circuit court on March 29, 2007. The September 11, 2006, RCr 11.42 motion clearly constituted a successive RCr 11.42 motion. All of the allegations of error raised therein were known to Brooks at the time he filed the initial RCr 11.42 motion in 2004 and could have reasonably been presented in the initial RCr 11.42 motion. In fact, the circumstances surrounding Brooks' claim that trial counsel was ineffective due to a conflict of interest was well known at the time of trial and should have been raised either on direct appeal or possibly in the initial RCr 11.42 motion. *See Kirkland v. Com.*, 53 S.W.3d 71 (Ky. 2001). And, one ground (failure of trial counsel to investigate) was clearly raised in both motions. As such,

we hold that the September 11, 2006, RCr 11.42 motion is merely a successive RCr 11.42 motion and was properly denied by the circuit court. *See Hampton*, 454 S.W.2d 672.

For the foregoing reasons, the Order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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